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No. 82-1577

In the Supreme Court of the United States

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF APPELLANTS ON THE MERITS

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QUESTION PRESENTED

Whether certain provisions of the Michigan Agricultural Marketing and Bargaining Act conflict with and are therefore preempted by the Federal Agricultural Fair Practices Act of 1967.

PARTIES TO PROCEEDINGS BELOW

The appellants in this Court were appellants in the Michigan Supreme Court and plaintiffs in the trial court. They are:

1. Michigan Canners and Freezers Association, Inc. (now known as Michigan Food Processors Association, Inc.), a Michigan non-profit corporation.

2. Forty-four individual and corporate members of the Michigan Canners and Freezers Association, Inc., who joined as plaintiffs at the time suit was initiated. Their names, too numerous to list in the caption, are set forth in the appendix to the Jurisdictional Statement at pages A112 through A114 and incorporated here by reference.

3. Dukesherer Farms, Inc., a Michigan corporation.

4. Ferris Pierson, an individual citizen of the State of Michigan.

The appellees in this Court were appellees in the Michigan Supreme Court and defendants in the trial court. They are:

1. The Agricultural Marketing and Bargaining Board, an administrative agency of the State of Michigan, represented below by the Michigan Attorney General.

2. Michigan Agricultural Cooperative Marketing Association, Inc., a Michigan corporation.

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THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF APPELLANTS ON THE MERITS

Appellants, plaintiffs below, appeal from a final judgment of the Supreme Court of Michigan, dated December 23, 1982, upholding the validity of the Michigan Agricultural Marketing and Bargaining Act.

OPINIONS BELOW

The final opinion of the Michigan Supreme Court (J.S. App. A1-A32)[1] is reported at 416 Mich. 706, 332 N.W.2d 134 (1982). That Court's decision in an earlier appeal (J.S. App. A44-A59), which dealt with jurisdictional issues

1. Citations to the appendix to the Jurisdictional Statement are made as follows: "J.S. App. A....."

of state law, is reported at 397 Mich. 337, 245 N.W.2d 1 (1976). The opinions of the trial court on jurisdiction (J.S. App. A35-A37) and on the merits (J.S. App. A60-A76) are not officially reported.

GROUNDS FOR JURISDICTION

Appellants initiated this case by the filing of a complaint in the Michigan Circuit Court seeking injunctive and declaratory relief against the enforcement of the Michigan Agricultural Marketing and Bargaining Act, a statute of the State of Michigan. Among other averments, the complaint alleged that the state statute was unconstitutional because it was preempted by the Federal Agricultural Fair Practices Act of 1967. The trial court and the Michigan Supreme Court upheld the validity of the act on all grounds, including the ground of federal preemption. The Michigan Supreme Court issued a final judgment (J.S. App. A79) and supporting opinion (J.S. App. A1-A32) on December 23, 1982. No party requested a rehearing.

Appellants filed their Notice of Appeal to this Court with the Michigan Supreme Court and Circuit Court on March 8, 1983. (J.S. App. A31). Appellants docketed this appeal on March 22, 1983, within ninety days of the final judgment below. This Court noted its probable jurisdiction on October 17, 1983.

The jurisdiction of this Court rests upon Title 28 of the United States Code, Section 1257(2). The issue of the repugnancy of the state statute to the Federal Agricultural Fair Practices Act of 1967 was properly raised at each level of state court proceedings and was expressly considered and decided by the Michigan Supreme Court. (Opinion, J.S. App. A4-A17). This Court therefore has appellate jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause, Article VI of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Agricultural Fair Practices Act of 1967, Title 7, United States Code, Sections 2301-2306 (1973):

> [Set out in full in the appendix to the Jurisdictional Statement, pages A84 through A88.]

Michigan Agricultural Marketing and Bargaining Act, Act 344 of the Public Acts of 1972, Michigan Compiled Laws, Sections 290.701 - .726 (Supp. 1982):

> [Set out in full in the appendix to the Jurisdictional Statement, pages A89 through A111.]

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the conflicting provisions and goals of federal and state statutes regulating agricultural bargaining. Congress passed the Agricultural Fair Practices Act of 1967 (the "Federal Act") on April 16, 1968. The Federal Act seeks to accommodate the potentially conflicting interests of individual farmers, cooperatives of farmers, and purchasers of farm products. It balances those interests by protecting the right of farmers to form cooperative associations, while safeguarding the right of individual farmers to remain independent and preserving the right of purchasers to deal with farmers of their choice.

Four years later, the Michigan legislature enacted the Michigan Agricultural Marketing and Bargaining Act (the "Michigan Act"). The Michigan Act differs radically from the Federal Act. Under the Michigan Act, the state accredits cooperatives if they represent a majority of farmers who produce a majority of a certain crop. Once the cooperative is accredited, each farmer growing that crop is bound by the cooperative's price, terms and conditions, whether or not the farmer consents to representation by the cooperative. Under Michigan's compulsory union system, nonconsenting farmers may not negotiate different terms and conditions on their own behalf, and purchasers are required to bargain with the cooperative.

Because the Michigan Act stands as a clear obstacle to the accomplishment of the Federal Act's goals and purposes, appellants began this action to declare the Michigan Act unconstitutional.

B. Challenged Provisions of the Michigan Act

Appellants challenge the following provisions of the Michigan Act as repugnant to the Federal Act:

Section 4(1)(g): prohibits, as an unfair practice, a processor's refusal to bargain with certain accredited associations.

Section 4(1)(h): prohibits, as an unfair practice, a processor's negotiation with a producer included in a bargaining unit after accreditation of an association.

Section 10(1), the third and fifth sentences: require the preliminary declaration of accreditation to state that the association is the exclusive sales agent for all producers in a bargaining unit and provide for the mandatory deduction of marketing service fees from the proceeds of all producers.

Section 10(2), the final sentence: provides that all producers in a bargaining unit are "deemed" to assent to accreditation of an association if a majority of producers representing over 50% of crop production assent to accreditation.

Section 13(1), the first and third sentences: provide that an accredited association is the exclusive representative of all producers in the bargaining unit and require processors to negotiate with accredited associations.

C. Parties

Appellants include representatives of both groups directly affected by the Michigan Act: farmers (defined as "producers" in both acts) and processors of fruits and vegetables (included within the definition of "handlers" in both acts). Michigan Canners and Freezers Association, Inc. is a non-profit corporation having as its members

processors of fruits and vegetables. The forty-four individual members of the association are asparagus processors who joined as parties plaintiff to this action. Dukesherer Farms, Inc. is a corporation engaged in asparagus farming. Ferris Pierson is also an asparagus farmer.

Appellee Agricultural Marketing and Bargaining Board (the "Board") is an administrative agency of the State of Michigan. The Board was established under section 3 of the Michigan Act to administer and enforce bargaining between producers and handlers of various agricultural commodities, including asparagus.

Appellee Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA") is a Michigan agricultural cooperative. As a cooperative association that bargains on behalf of producers, MACMA is a handler under the Federal Act, 7 U.S.C. § 2302(2)(3), but is not a handler under the Michigan Act, Mich. Comp. Laws § 290.702(a), (g).

D. Proceedings Below

In November of 1973, the Asparagus Growers Division of MACMA filed a petition with the Board seeking a determination of a bargaining unit for asparagus under the Michigan Act. In December of 1973, the Board approved a bargaining unit encompassing all Michigan farmers who produced a certain minimum quantity of asparagus during a defined marketing period. On January 25, 1974, the Board accredited MACMA as the sole sales and bargaining representative for all producers included in the Michigan asparagus bargaining unit. Acting pursuant to the Michigan Act, MACMA thereafter negotiated on behalf of the bargaining unit members, including appellants Dukesherer Farms and Pierson, regarding the 1974 asparagus crop. These actions were performed over the objection of all appellants.

On March 7, 1974, appellants filed a complaint in the Ingham County Circuit Court challenging the Michigan Act and the Board's actions in connection with the asparagus bargaining unit. The complaint raised a number of federal and state claims, including the claim that the Michigan Act was unconstitutional because it was preempted by the Federal Act.

On motion of defendants, the Circuit Court dismissed the complaint, holding that the state court of appeals had exclusive subject matter jurisdiction under state law. (Order and Opinion, J.S. App. A33-A37). Appellants thereafter unsuccessfully sought review in the Court of Appeals. (J.S. App. A38-A41). On January 15, 1975, the Michigan Supreme Court granted leave to appeal the dismissal and invited the parties to brief the substantive issues of constitutionality, which included the federal preemption issue. (Order, J.S. App. A42).

On March 18, 1975, appellants filed their brief on appeal in the Michigan Supreme Court, preserving the following question: "1. Is the Agricultural Marketing and Bargaining Act unconstitutional because it conflicts with Federal Agricultural Fair Practices Act of 1967, and is thereby preempted by such legislation?"[2] On review of the lower court dismissal, the Michigan Supreme Court reversed, holding that the Circuit Court did have subject matter jurisdiction to consider the constitutional challenges to the Michigan Act. (Opinion, J.S. App. A44-A55). The action was remanded for the development of a factual record, made necessary by appellant's police power claim. (*Id.* A46). The court did not then reach the merits of the preemption issue.

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2. Under Michigan practice, questions are preserved for appeal by their inclusion in the "Statement of Questions Involved" in an appellant's brief. Mich. Gen. Ct. R. 813.1.

The Circuit Court conducted a non-jury trial between September 6 and September 27, 1977. The trial court took extensive proofs, virtually all of which related to the police power issue. Appellants again briefed and argued the preemption issue raised in this appeal. In an opinion filed February 2, 1981, the Circuit Court upheld the constitutionality of the state act on all grounds. The trial court expressly considered the preemption issue, holding that the Federal Act did not preempt the Michigan Act. (Opinion, J.S. App. A60-A76).

The parties returned to the Michigan Supreme Court, pursuant to the court's reservation of appellate jurisdiction. Appellants' brief again raised the preemption issue in the "Statement of Questions Involved" and presented arguments and authorities in support of preemption. The Michigan Supreme Court considered and rejected appellants' contention, holding that the Federal Act did not create or preserve the right of individual producers or processors to bargain individually and so was not inconsistent with the Michigan Act. (Opinion, J.S. App. A4-A17, and Final Judgment, J.S. App. A79-A80). The court also held, on a prospective basis, that future accreditations under the Michigan Act must be conducted in accordance with the notice and hearing procedure of the state administrative procedures act. This state law ruling did not affect the validity of the Michigan Act or the accreditation of the asparagus bargaining unit. This appeal involves only the question of federal preemption.

SUMMARY OF ARGUMENT

The Michigan Agricultural Marketing and Bargaining Act is preempted by the Federal Agricultural Fair Practices Act, because it stands as an obstacle to the accomplishment of the full purposes of the Federal Act. Congress, after careful study, determined that the marketing of farm products should be regulated in such a way as to protect the right of farmers to form cooperatives, the right of individual farmers to remain independent of those cooperatives, and the right of handlers to deal with the farmers of their choice. Congress implemented these potentially conflicting policies by enacting the Agricultural Fair Practices Act. The Michigan legislature also wished to protect the right of farmers to form bargaining associations, but did not balance that right in any meaningful way with the right of farmers not to join such associations, or with the right of handlers to deal with individual farmers of their choice. The Michigan Act therefore differs radically from the Federal Act. Rejecting the free market system adopted in the Federal Act, the Michigan Act provides for a form of compulsory unionism in the farm area.

The Federal Act specifically protects the right of a farmer not to join a cooperative and protects that right from encroachment by cooperatives themselves. The Michigan Act destroys this right by requiring each farmer in a bargaining unit to become a *de facto* member of the association, regardless of the farmer's wishes. It cannot be seriously argued that a farmer who is bound by all of the terms and conditions of contracts negotiated by an association, including price, quality, quantity and service fees, has been protected in his right to refrain from belonging to an association. The farmer cannot sell his produce except on the terms and conditions dictated by an association that he does not wish to join.

The Federal Act preserves a handler's pre-existing right to refuse to deal with a cooperative and to deal on an individual basis with the farmers of his choice. In contrast, the Michigan Act forces handlers to deal only with cooperative associations. Once an accredited association is formed under Michigan law, a handler is prohibited from negotiating with any individual farmer included in the association's bargaining unit, even if the farmer has refused to join the association.

The Michigan Act, which imposes a mandatory union system upon the farm industry, frustrates federal rights and policies. Congress sought to provide for a free market system in the farming industry, with each element of that industry free to deal independently with the other. Michigan's system coerces non-consenting farmers and handlers for the benefit of cooperatives. Because the two approaches cannot be reconciled, the Michigan Act is necessarily preempted.

ARGUMENT

I. APPELLANTS' CLAIM OF PREEMPTION INVOLVES IMPORTANT ISSUES OF FEDERALISM AND TURNS UPON THE CONSTRUCTION OF AN ACT OF CONGRESS.

The Supremacy Clause of Article VI of the United States Constitution is the keystone of our federal system. Since the early days of our nation, this Court has held that the Supremacy Clause invalidates state laws that "interfere with or are contrary to, the laws of congress." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

The preemption doctrine invalidates state regulation in two distinct situations. Whenever Congress has occupied an entire field of regulation, the federal legislation preempts all state laws on the subject matter in question. In such a case, any state regulation of the subject matter is barred, even if the state statute is harmonious with the federal enactments. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

This type of preemption is not present in this case. The Federal Act has apparently not completely "occupied the field". Section 2305(d) of the Federal Act provides that "existing state law" shall not be changed or modified by the Federal Act. The Federal Act thus leaves some latitude for regulation by the states.

The challenged sections of the Michigan Act are, however, voided under the second preemption standard. When Congress has not completely occupied a field of regulation, a state law is nevertheless preempted to the extent that it conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility or where state law

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982).

The Michigan Supreme Court was bound to apply these principles in deciding appellants' preemption claim. When faced with a potential conflict between federal and state laws, state courts typically resolve the conflict by giving their own law a "narrowing construction". The Michigan Supreme Court strayed from that course. It resolved the patent conflict between the Federal Act and the Michigan Act by giving its own law a broad interpretation while narrowly construing the Federal Act. The court found that the Federal Act had only one objective: to enhance producer bargaining power. It accordingly held that the Federal Act did not create or protect rights of private dealing (Opinion, J.S. App. A8); and that "Section 2304 [of the Federal Act] is nothing more than an explanation of what [the Act] was not intended to do." (*Id.*, A8). The court rejected the proposition that the Michigan Act frustrated Congress' objectives, because it found "no intent on the part of Congress, as plaintiffs assert, to affirmatively 'strike a balance' among competing interests." (*Id.*, A14).

The Michigan Supreme Court left no doubt that its finding of a lack of preemption rested upon a construction of the Federal Act: "Were we to agree that § 2304, or any provision in [the Federal Act], was meant to affirmatively *create* or *protect* rights of private dealing between individual producers and processors, we would agree that [the Michigan Act] must fall because, plainly [the Michigan Act], conflicts with that result. However, we do not find such meaning in the provisions of the federal act." (*Id.*, A8). The state court thereby com-

mitted itself to an indefensibly narrow interpretation of the Federal Act and the preemption doctrine.

The interpretations of the Michigan Supreme Court are demonstrably erroneous. Congress designed the Federal Act to accomplish three distinct goals. (Section II.A., below). One goal, the protection of independent farmers against compulsory cooperative membership, is totally destroyed by the Michigan Act. (Section II.B., below). The Michigan Act similarly frustrates the Federal Act's objective of preserving a competitive market system in which processors are free to deal with farmers of their choice. (Section II.C., below). The preemption doctrine requires nullification of a state law that so frustrates federal policy, regardless of the purpose of the state act. (Section III., below).

II. THE MICHIGAN ACT STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE FULL OBJECTIVES OF CONGRESS AS EXPRESSED IN THE FEDERAL FAIR PRACTICES ACT AND IS THEREFORE PREEMPTED.

A. The Regulatory Schemes Established By The Federal And State Acts Are Fundamentally Inconsistent.

The United States Congress and the Michigan legislature have each passed legislation to protect a farmer's right to join a cooperative association, and to bargain collectively through that association. Although the Michigan and Federal statutes share that common goal, they establish regulatory schemes that irreconcilably conflict.

Congress chose to protect a farmer's right to bargain through an association only insofar as that right does not conflict with the rights of purchasers of farm products

and the right of individual farmers to remain independent of cooperative associations. The Federal Act evidences three distinct objectives. First, the Act authorizes farmers to form voluntary cooperative associations and prohibits discrimination against farmers on the basis of membership in such associations. 7 U.S.C. §§ 2301, 2303. Second, it protects an individual farmer's right not to join a cooperative association and prohibits interference with that right by processors and cooperative associations. 7 U.S.C. §§ 2301, 2303. Finally, the Federal Act protects the right of purchasers of farm commodities to deal freely with the farmers of their choice. 7 U.S.C. § 2304.

The legislative history of the Federal Act shows that Congress deliberately pursued each of these objectives. As first introduced, the agricultural marketing bill had only one dimension. H.R. 11146, S. 2849, 88th Cong., 2d Sess. (1964). It was proposed as an amendment to the Capper-Volstead Act of 1922, 7 U.S.C. §§ 291-292, which had granted antitrust immunity to certain concerted action by agricultural cooperatives. The bill prohibited processors from interfering with a farmer's right to join an association. It prohibited processors from discriminating against association members and from coercing a farmer to breach or cancel agreements with associations. The original bill was not reported out of committee.

Senator Aiken reintroduced the bill in the 89th Congress, in essentially unchanged form. S. 109, 89th Cong., 1st Sess. (1965). During Senate hearings, many senators and witnesses expressed concern that the bill could be construed as substituting a collective bargaining system for the existing free market system. Specifically, witnesses called for protection of a farmer's right *not to join* an association and for recognition that processors should not be forced to deal with cooperatives. *See, e.g.*, Hear-

ings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 89th Cong., 2d Sess. 41, 125-127 (1966).

As a result of the hearings in 1966, the sponsors proposed an amended version of the bill. S. 109, 90th Cong., 1st Sess. (1967), *reprinted in* Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 90th Cong., 1st Sess. 1-3 (1967) (hereinafter "May, 1967, Senate Hearings"). The 1967 bill was no longer a proposed amendment to the Capper-Volstead Act. The bill was now entitled the "Agricultural Producers Marketing Act". In response to requests for protection of individual farmers against cooperatives, section 3(2)(3) of the revised bill included cooperatives in the statutory definition of "handler". *See* May, 1967, Senate Hearings, *supra* at 8, 82. But the bill continued to protect only the "right to join and belong to an association of producers" and continued to prohibit coercion of a farmer to "breach, cancel or otherwise terminate" contracts with associations. S. 109, 90th Cong., 1st Sess. § 4. The bill contained no provision protecting the right not to join an association, nor did it recognize a processor's right to deal free of associations.

A Senate subcommittee conducted hearings in May of 1967, during which witnesses continued to complain that the bill was "one-sided". May, 1967, Senate Hearings, *supra* at 94. Witnesses again called for express protection for a farmer's right not to join an association and for the rights of processors. *See, e.g.*, *id.*, at 95, 110, 131, 133-35, 139-140, 142-148. Senators indicated agreement with these concepts. *See, e.g.*, *id.*, at 10-11, 13-17, 170.

The May, 1967, Senate Hearings produced a significantly revised bill. S. 109, 90th Cong., 1st Sess., 113 Cong.

Rec. 21,410 (1967). The bill's prohibited practices were expanded to proscribe, for the first time, interference with the right "to refrain from joining or belonging to an association." *Id.*, § 4(a). The bill also would prohibit the coercing of a farmer to enter into or maintain a contract with an association, as well as coercion to breach or terminate the contract. *Id.*, § 4(c). The revised bill contained a new section 5, which disclaimed any intent to prohibit proper dealings between processors and farmers or to compel dealings between processors and associations. Significantly, the bill's title was changed from the "Agricultural Producers Marketing Act" to the "Agricultural Fair Practices Act". The Senate Committee felt that the new title more accurately reflected the bill's purpose "to establish standards of fair practices required of handlers and associations of producers in their dealings in agricultural products." S. Rep. No. 474, 90th Cong., 1st Sess. (1967), *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1869 (hereinafter "S. Rep. 474").

The Senate passed S. 109 in its revised form. 113 Cong. Rec. 21,411 (1967). As passed by the Senate, the bill represented a much different approach to agricultural marketing from that of its predecessors. The bill's purpose was no longer merely to foster cooperatives; it was now designed "to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association." 113 Cong. Rec. 21,411 (1967) (remarks of bill's sponsor, Senator Aiken). By revision of section 4 and inclusion of section 5, the bill was felt to be "fair to producers, associations of producers, handlers, and any others who may be affected by the bill." Senate Report 474, *supra*, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1868.

The bill then proceeded to the House of Representatives and was referred to the Committee on Agriculture. 113 Cong. Rec. 21,582 (1967). The House left substantially untouched section 5, which safeguarded a processor's right to deal with farmers of his choice. The House changed the wording of the provision safeguarding a farmer's right not to join an association, but did not change the substance of that right. "We made of the original legislation a two-way proposal which would actually assure to any producer the right to belong or not to belong to a cooperative." 114 Cong. Rec. 7451 (1968) (remarks of Congressman Poage, Chairman of the House Committee on Agriculture). The Senate concurred in the House revisions; the Act passed on April 16, 1968.

The Federal Act's legislative history leaves no doubt about the Act's objectives. Four years of intense debate produced a substantially altered bill, which balanced the competing interests of all parties. In contrast to its predecessors, the enacted legislation created a competitive system in which associations, independent farmers, and processors would all be free from compulsion or coercion. Some of the original supporters of the bill complained that the Act's final version "tortured the original intent of S. 109" because the Act restricted both handlers and cooperatives and granted "additional authority to handlers of farm produce." H.R. Rep. No. 824, 90th Cong., 1st Sess. 8-9 (1967) (opposing views of Congressmen Foley, Teague and Zwach). Congress' ultimate goal was no longer only to foster agricultural cooperatives, but also to "strengthen the competitive marketing system for agricultural commodities." *Id.* at 1.

Four years later, the Michigan Legislature passed the Michigan Agricultural Marketing and Bargaining Act. The Michigan Act protects the rights of farmers who wish to

join cooperatives, but completely eliminates the rights of individual farmers and purchasers to deal directly with each other. Instead, the Michigan Act replaces the competitive market system established by the Federal Act with a union shop.

There is no question concerning the meaning or effect of the Michigan Act, since it has been authoritatively construed by the state supreme court. As interpreted by the state court, the act allows accreditation of a cooperative association representing a majority of producers who produce a majority of a certain crop, such as asparagus. Once accredited, that association becomes the exclusive bargaining agent for all Michigan asparagus growers in the defined unit. Mich. Comp. Laws §§ 290.710, 713. Those asparagus growers who do not wish to join the association are nevertheless bound by all of the terms and conditions of the association's contracts with asparagus purchasers, and must help support the association by paying a service fee. Mich. Comp. Laws § 290.710. The Michigan Act makes it unlawful for an asparagus purchaser to negotiate directly with an asparagus farmer who is included in such a bargaining unit, even if that farmer has chosen not to join the association. Mich. Comp. Laws § 290.704(1)(h). Additionally, a purchaser *must* bargain with an accredited association if it has had prior substantial dealings with the association or its members. Mich. Comp. Laws § 290.704 (1)(g). (*See* Opinion, J.S. App. A6-A7).

The provisions of the Michigan Act cited above irreconcilably conflict with the Federal Act. The Michigan Supreme Court openly admitted that the Michigan Act contains "compulsory" aspects central to the Act's operation. (*Id.* at A26). Those provisions eliminate a farmer's right to sell his crops independent of an association and force purchasers to bargain with associations. As shown below, the Michigan Legislature's substitution of a com-

pulsory union system for the free market system prescribed by Congress overrules the careful balance struck by Congress in the Federal Act.

B. The Federal Act Protects An Individual Farmer's Right Not To Join Or To Bargain Through A Cooperative, And The Michigan Act Destroys This Right.

1. *The Federal Act Protects Individual Farmers From Coercion By Cooperatives.*

The Federal Act expressly protects an individual farmer's freedom to join or refrain from joining a cooperative association. Section 2301 states the Congressional policy that farmers should be "free to join together *voluntarily* in cooperative organizations as authorized by law." (Emphasis added). Section 2303(a) gives producers the "*right* to join and belong or *to refrain from joining or belonging* to an association of producers" and protects that right from interference by "handlers". (Emphasis added). Section 2303(c) prohibits handlers from coercing or intimidating any producer to enter into or maintain (as well as to breach or cancel) a membership agreement or marketing contract with an association.

As recognized by the lower federal courts, the statutory definition of handler includes cooperative associations themselves. 7 U.S.C. § 2302(a)(3); *Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974); *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972). Congress thus consciously sought to protect the right of farmers to remain independent of cooperative associations and prohibited interference with that right by cooperatives themselves.

The Federal Act's legislative history demonstrates that Section 2303 means what it says. Both the Senate and

the House consciously intended to prohibit cooperatives from interfering with a farmer's right to deal free of an association. The version of the bill enacted by the Senate was unequivocal on this point. The Senate bill provided:

> SEC. 4. It shall be unlawful for any handler or association of producers knowingly to engage . . . in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers. . . .

S. 109, 90th Cong., 1st Sess. § 4, 113 Cong. Rec. 21,410 (1967). This provision was the result of widespread sentiment, expressed by both Senators and witnesses alike, that the "freedom of choice of any farmer to join or not to join an organization of his choice is a basic American right, and it must be protected." May, 1967, Senate Hearings, *supra* page 15, at 10 (1967) (remarks of Senator Williams).

The Senate Report explaining the addition of this provision expresses a deliberate protection of the right not to join associations:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice he should also be protected from improper pressure in the other direction, that is, improper pressure to join an association. The committee did not have before it any testimony to indicate that producers were being subjected to any improper pressure to join associations, but was convinced by the logic

> of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.

S. Rep. 474, *supra* page 16, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871. The Report goes on to state that the individual producer "should be free from improper pressure to interfere with his arrangements and dealings with handlers; and the committee substitute would provide him with this protection." *Id.* at 1872.

The House of Representatives preserved the Senate bill's protection of the rights of individual farmers against cooperatives. The House Committee on Agriculture rejected a proposed amendment that would delete the application of the prohibited practices to associations of producers. H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967). "The Committee felt that in those limited instances where cooperative associations are covered, the application of the bill is both justified and in the interest of producers themselves." *Id.* at 4-5.

The House did change the language of section 4, the prohibited practices section, to delete specific reference to associations. This change did not modify the substance of the section, because associations were already included in the statutory definition of "handler". As explained by Representative Sisk, the author of the amendment,

> Since the bill already makes clear that associations of producers are not excluded from the term "handler", this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretation more difficult.

114 Cong. Rec. at 7464 (1968).

In their debate surrounding approval of the Federal Act, its House sponsors left no doubt about their intention to "try to see that every producer has the right to sell his products to a cooperative, or to noncooperative handlers if he so sees fit." 114 Cong. Rec. at 7454 (1968) (remarks of Representative Poage). There is accordingly no room to argue that the Federal Act seeks only to protect the right to join cooperatives.

These and other statements in the Act's legislative history clearly show that Congress intended to protect the *economic* right to refrain from dealing through an association, and not simply the formal *associational* right not to become an official cooperative member. As Senator Jordan stated: "The law intends that . . . he should not be made to join unless he wants to join. He ought to be able to sell anywhere he wants to sell." May, 1967, Senate Hearings, *supra* page 15, at 170. The comments of the members of the House of Representatives consistently support this interpretation. As Chairman Poage explained to the House: "We made of the original legislation a two-way proposal which would actually assure to any producer the right to belong or not to belong to a cooperative. . . . We certainly felt it is unfair to deny any man the right to sell his crop because he belongs to a group." 114 Cong. Rec. 7451 (1968).

The economic right to deal free of cooperatives includes the right to be free from compulsory financial support of cooperatives: "The fees being charged by these associations are no small matter to the farmer. . . . Some of these associations are assessing members 1 percent of their gross. That is $250 out of that farmer's pocket to belong to the association." 114 Cong. Rec. 7450 (1968) (remarks of Representative Latta). Congress was obviously concerned with a farmer's economic right to trade

in a free market, and not with the hollow associational right not to be a formal cooperative member.

2. *The Michigan Act Destroys A Non-Consenting Farmer's Right To Deal Free of Cooperatives.*

The language of Section 2303 of the Federal Act and the abundant legislative history clearly show that Congress intended to protect a farmer's right not to join, deal through, or contract with an association. If, therefore, a group of farmers in a cooperative association coerced an unwilling farmer into marketing his produce through the association, the cooperative's conduct would clearly violate Section 2303.

In contrast, the Michigan Act decrees that after an association is accredited, an individual farmer in that association's bargaining unit may no longer negotiate individually with a processor for the sale of his crops. Instead, the farmer is bound by the terms and conditions of the association's contracts, and the association is legislatively appointed as his "exclusive representative". Mich. Comp. Laws § 290.713. The farmer is irrevocably bound by the activities of the association and must pay a service fee, even if he has not voluntarily joined that association. (See Michigan Supreme Court Opinion, J.S. App. A5-A8). The only difference under the Michigan Act between a "member" and a "nonmember" of an association is that a member has voluntarily appointed the cooperative association as his exclusive agent. Mich. Comp. Laws § 290.702(i).

Unlike the Federal Act, the Michigan Act does not prohibit cooperatives from coercing farmers in the exercise of their right to refrain from joining a cooperative. Mich. Comp. Laws § 290.704(2). The very essence of the Michigan Act is the coercion of non-consenting farmers for the

good of the cooperative. (*See* Michigan Supreme Court Opinion, J.S. App. A26).

It is hard to imagine a more complete abridgement of a farmer's federal rights than is created by the Michigan Act. Nothing remains of a Michigan farmer's right to refrain from joining an association. The Michigan Act allows a group of producers to band together and, so long as they represent a majority of farmers and product, impose their price, terms of sale and "service fees" upon all non-consenting farmers. This is precisely the conduct forbidden by Section 2303 of the Federal Act.

The Michigan courts concede that the Michigan Act destroys the right of non-consenting farmers to deal individually. The circuit court found that "the right to deal individually is gone" and that "the minority, for the good of all, are required to go along." (Opinion, J.S. App. A73). The court stated, however, that "[t]his suggested loss of freedom is no more significant than that lost by a non-union member employed in an agency shop." *Id.* In so holding, the circuit court limited the Federal Act's protection to the mere associational right not to be a formal cooperative member.

The circuit court's analogy is unfounded. Agency shops have been allowed in the labor law context because such arrangements are *specifically authorized* by federal law. Section 7 of the National Labor Relations Act provides that:

> Employees shall have the right . . . to bargain collectively . . . and shall also have the right to refrain from any or all such activities *except* to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

29 U.S.C. § 157 (emphasis added).

Section 8(a)(3) of the National Labor Relations Act authorizes an employer and a union to agree to require employees to join the union. 29 U.S.C. § 158(a)(3). Thus, in the labor law context, the NLRA itself authorizes certain types of mandatory representation of employees, as an exception to the general "right to refrain" from collective bargaining. In *N.L.R.B. v. General Motors Corporation*, 373 U.S. 734 (1963), this Court held that agency shop agreements were lawful because Congress had authorized agency shops in section 8(a)(3) of the National Labor Relations Act, and its predecessor section 8(3). The Court found that Congress passed section 8(a)(3) precisely because it feared that the general right to refrain from joining a union might bar union security arrangements. 373 U.S. at 738-39.

The Court also noted in *General Motors* that the distinction between an agency and a union shop "is more formal than real." 373 U.S. at 744. Although the Court acknowledged that some individuals may consider it important that they need not be union members, Mr. Justice White observed that an individual's position in an agency shop is "the practical equivalent of union 'membership.'" 373 U.S. at 743.

The Agricultural Fair Practices Act is not comparable to the Wagner Act. The Federal Act, like section 7 of the Wagner Act, provides that a farmer shall have the right to refrain from joining a collective bargaining association. Unlike the Wagner Act, however, the Agricultural Fair Practices Act does not carve out an exception for agency shops. Instead, the right to refrain from joining an association stands unmodified, as an absolute right.

The Michigan Act is therefore not saved by its protection of the hollow right not to become a formal member of the cooperative. Mich. Comp. Laws § 290.704(1)(a).

Limitation of the right conferred in Section 2303 to a mere associational right finds no support in the language or history of the Federal Act and amounts to a complete nullification of the Act's provisions.

The Michigan Supreme Court did not embrace the circuit court's analogy to agency shops. (Opinion, n. 13, J.S. App. A10). The Supreme Court, however, did not deny that the Michigan law destroys the freedom of a non-consenting farmer to deal individually. According to the court, this effect of the Michigan Act does not contravene the Federal Act because the Federal Act was not "meant to affirmatively create or protect rights of private dealing between individual producers and processors." (See Opinion, J.S. App. A8). The sole goal of the Federal Act, the court said, was to protect the right to form cooperatives and to prevent "handler" coercion.

The state court was wrong on all grounds. First, the language of Section 2303, and its supporting legislative history, make it patent that Congress was protecting the "right to . . . *refrain from joining* or belonging to an association," 7 U.S.C. § 2303(a) (emphasis added), as well as the right to join associations. Congress could not have used more explicit language in the protection of the right to be free of an association, nor could the members of Congress have been more direct in their statements, quoted above, recognizing that right.

Second, the "handler" coercion prohibited by the Federal Act includes coercion by cooperatives themselves. A reading of the Michigan Supreme Court Opinion demonstrates that the court ignored this important fact. The state court expressly, and improperly, equated the terms "handler" and "processor" (Opinion, J.S. App. A5) and thereby nullified Congress' intent to protect individual farmers against associations themselves. Cooperatives are

"handlers" under the Federal Act (see discussion at pages 19-21 above), and the prohibition in Section 2303 against handler interference with the right not to join associations was intended to apply to cooperatives. There is accordingly no support for the proposition that the relationship between cooperatives and non-consenting farmers is federally "unregulated".

Finally, the Michigan Supreme Court erred in holding that the states are free to readjust the relationships between farmers and cooperatives because the Federal Act does not expressly "forbid" the states from doing so. (Opinion, J.S. App. A10). This Court has never required, as a prerequisite to preemption, that Congress expressly prohibit state law interference with federal law. The Supremacy Clause already does so. Nor has the Court entertained the thought that the states may empower one group to abridge private rights conferred by Congress upon another. The notion that the states are free to nullify federal law is a discredited one, antithetical to the Supremacy Clause. *Cooper v. Aaron,* 358 U.S. 1 (1958).

The states may enact laws whose effects are contrary to federal law only if Congress so ordains. The most familiar application of this concept is the doctrine enunciated in *Parker v. Brown,* 317 U.S. 341 (1943), which exempts from the antitrust laws the anticompetitive actions of the states. Believing that Congress intended the Sherman Act to affect only individual action and not actions of the state as sovereign, this Court held that anticompetitive state action is not preempted by the Sherman Act. 317 U.S. at 352.

Assuming the general application of this antitrust concept to other fields of regulation, the *Parker v. Brown* doctrine does not save but condemns the Michigan Marketing Act. In contrast to the Sherman Act's legislative

history, there is no indication that Congress sought to exempt state action from the operation of the Agricultural Fair Practices Act. Even if such an intent were presumed, it is clear that the scheme embodied in the Michigan Act does not constitute state action, as defined by this Court.

The immunity from preemption created by *Parker v. Brown* is only for true state action, that is, "official action taken by state officials." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591 (1976). Individual anticompetitive action, even if authorized, approved, encouraged or directed by the state, is not exempt. 428 U.S. at 591-93. This Court has established two standards for distinguishing state action from private action authorized or approved by the state. First, the challenged restraint must be one clearly articulated and affirmatively expressed in state policy. Second, the policy must be actively supervised by the state itself. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The coercion of non-consenting farmers by accredited cooperatives under the Michigan Act does not fit this definition of state action. Assuming that the majority rule provisions of the Michigan Act reflect an articulated state policy, that policy is not supervised by the state in any way. Individual cooperative members band together to form associations. It is the association that sets prices, negotiates quality, quantity and other terms, and decides whether to agree or not agree with processors. The State of Michigan does not monitor market conditions, pass upon the prices or terms dictated by the association, or engage in any "pointed re-examination" of the program. *Id.* at 105. The state only makes the initial decision whether the association meets the representational and other statutory requirements for accreditation, and prohibits as an unfair practice any deviation from the terms dictated by the cooperative.

In this important respect, the Michigan scheme is precisely the same as those condemned in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Those cases make it clear that a state scheme compelling unwilling parties to adhere to prices privately established by others does not qualify as "state action".

In *Midcal*, the Court considered a state statute requiring the filing of resale price contracts or price schedules establishing the sale price of liquor. The prices filed by a single wholesaler bound all wholesalers in the area. The statute prohibited, as an unfair trade practice, sales by a wholesaler below the established price. The state did not attempt to review or adjust the prices so established. 445 U.S. at 99-100. The Court held that the scheme did not qualify for the state action exemption of *Parker v. Brown*, because the program was not actively supervised by the state. "The State simply authorizes price setting and enforces the prices established by private parties." 445 U.S. at 105.

Schwegmann involved a similar state law, which bound non-consenting retailers to resale prices set by contract between a wholesaler and other retailers. Deviation from the established prices was prohibited as an unfair practice. Even though the compulsion to adhere to the established prices was provided by state statute, the program did not constitute state action, because the state merely compelled adherence to privately established prices. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 n. 30 (1976).

As was true in *Midcal* and *Schwegmann*, the State of Michigan exercises no active supervision over the prices and terms of trade established by the cooperative. The

state merely authorizes private price setting and forbids deviation as an unfair practice. Non-consenting farmers are bound by the decisions of the cooperative "if a producer majority sees fit" (Opinion, J.S. App. A10), not as the result of the conscious act of the state as sovereign. This is a far cry from the market proration system sanctioned in *Parker v. Brown*. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591 n. 24 (1976).

In light of these authorities, the reasoning of the Michigan Supreme Court is seriously flawed. Even accepting the court's premise that the Federal Act was designed to affect only the coercive conduct of individual handlers, the states are not free to lend their coercive power to the private decisions of the cooperatives. The Michigan Act merely authorizes accredited associations to do what the Federal Act forbids. As this Court has stated, "a state does not give immunity to those who violate [federal law] by authorizing them to violate it, or by declaring that their action is lawful." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980), *quoting Parker v. Brown*, 317 U.S. 341, 351 (1943).

As a consequence, there is an irreconcilable conflict between the Federal Act and those sections of the Michigan Act that directly result in the destruction of a non-consenting farmer's right to deal free of a cooperative. [Sections 10(1) (third and fifth sentences); 10(2) (final sentence); 13(1) (third sentence)].[3]

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3. To the extent that other challenged sections prevent processors from negotiating with non-members of the cooperative, those provisions are likewise void. [Sections 4(1)(g), 4(1)(h)]. The right of a non-consenting farmer to deal free of cooperatives would be meaningless if all processors were nevertheless restrained from dealing with the farmer.

C. The Michigan Act Undermines The Federal Act's Objective Of Preserving A Competitive Marketing System In Which Processors Are Free To Deal With Farmers Of Their Choice.

The language and legislative history of the Federal Act demonstrate Congress' intent to preserve a free market system, in which processors would not be forced to deal with cooperatives. The Michigan Act completely contravenes this objective.

Congress enacted section 5 of the Federal Act to make clear the limits of cooperative power. While prohibiting discrimination against farmers on account of their membership in a cooperative, Congress denied to cooperatives the power to compel producers to bargain with them:

> *Disclaimer of Intention to Prohibit Normal Dealing.* Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.

7 U.S.C. § 2304.

The Act's legislative history demonstrates that section 2304 is the result of Congress' deliberate balancing of competing interests. As noted above, the original versions of the agricultural marketing bill contained no recognition of processors' rights. (See discussion in Section II.A. above). During Senate hearings in 1966, Senators and witnesses expressed concern that the bill would substitute a mandatory collective bargaining system for the existing free market system. *See, e.g.*, Hearings on S.109 Before the Subcomm., of the Senate Comm. on Agriculture and Forestry, 89th Cong., 2d Sess. 49, 124, 194, 196, 202 (1966).

The American Farm Bureau, the bill's original proponent, attempted to dispel these fears. The Farm Bureau spokesman testified: "We want to emphasize that Farm Bureau does not seek, and will not support, legislation . . . to force processors to negotiate with marketing associations." *Id.* at 15.

The Justice Department also objected to the bill's possible coercive effects on processors. The Department opposed the original bill because it could be interpreted as forcing purchasers to buy through associations, without freedom to negotiate with individual farmers. May, 1967, Senate Hearings, *supra* page 15, at 107-108 (Letter by Deputy Attorney General Ramsey Clarke to House Judiciary Committee Chairman Cellar, July 25, 1966).

The bill, as reintroduced in 1967, still did not address the rights of processors. S.109, 90th Cong., 1st Sess. (1967), *reprinted in* May, 1967, Senate Hearings, *supra* page 15, at 1-3. Opposition persisted on the ground that the bill was in effect a Wagner Act, endorsing or allowing unions in the farm industry. *See* 113 Cong. Rec. 7409 (1967). Witnesses again called for explicit protection of the processors' right to refuse to deal with associations and to purchase from farmers of their choice. May, 1967, Senate Hearings, *supra* page 15, at 86, 91. Proponents of the bill assured the Senators that the bill would not impair free competition or institute compulsory bargaining. For example, Senator Lausch, a co-sponsor of the bill, testified that "this bill does not at all deprive the purchasers or what are called handlers in the bill, of the right to choose from whomever they wished to buy. That is their Constitutional right." *Id.*, at 14.

In response to these concerns, the Senate Committee added a new section 5 (now 7 U.S.C. § 2304), to make it absolutely clear that the bill did not provide for a

compulsory union system of bargaining. While protecting the rights of farmers to voluntarily establish cooperatives, the bill was not intended to prevent the operation of a purchaser's legitimate, economic reasons for dealing or not dealing with the cooperative. S. Rep. 474, *supra* page 16, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1873.

The Senate passed the bill as amended in committee. Debate continued in the House over the amendments. The original proponents of S.109 complained about the inclusion of "undeserved and unnecessary protection" for processors, as a retreat from the bill's original intent. Hearings on S. 109 Before the House Comm. on Agriculture, 90th Cong., 1st Sess. 72 (1967) (hereinafter "House Hearings"); *see, id.* at 69, 79, 89-90, 150-51. Supporters emphasized the necessity to maintain a competitive marketing system in which economic freedom was preserved. Representative Schwengel testified that the bill as amended "would not end competition by preventing other purchasers from offering a producer a better price or contract than is available through his marketing association. . . . The rights of purchasers are protected . . . purchasers are free to deal with whomever they choose. This includes the right to refuse to deal with a marketing association." *Id.* at 38.

After hearings, the House Committee defeated a proposed amendment that would have eliminated section 5, relying in part on the need to preserve "the threads of compromise which hold this legislation together." H.R. Rep. 824, 90th Cong., 1st Sess. 5 (1967).

The bill reached the House floor. Representative Poage, Chairman of the Agriculture Committee, assured the House that the bill was not a "bargaining rights bill . . . nor does it propose to set up a closed shop." 114 Cong. Rec. 7453 (1968). The bill, including section 2304,

passed. Two federal district courts have since interpreted it as protecting a purchaser's right of individual dealing. *Garrison v. Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 237 (N.D. Ohio 1974).

It would be an overstatement to say that section 2304 *creates* the right of purchasers to choose their own suppliers. Congress realized that it was not legislating on a clean slate, and that both purchasers and suppliers already enjoyed the right to choose their own customers. Legislators considered these pre-existing rights as "inherent" or "constitutional". *See, e.g.*, May, 1967, Senate Hearings, *supra* page 15, at 14 (statement of Senator Lausch); House Hearings, *supra* page 33, at 16-17 (statements of Representative Jones). Witnesses characterized the freedom to deal as "fundamental" and traced it to this Court's decision in *United States v. Colgate & Co.*, 250 U.S. 300 (1919). *See* May, 1967, Senate Hearings, *supra* page 15, at 42, 91; House Hearings, *supra* page 33, at 97, 149.

Congress was therefore not concerned with the creation of purchasers' rights, since those rights already existed. The crucial question for Congress was the extent to which these pre-existing rights should be abridged or curtailed by the newly-created rights of cooperatives. It was this question that Congress addressed in section 2304. Congress decided to curtail pre-existing freedom to the extent of prohibiting refusals to deal motivated by discrimination against cooperatives. Congress preserved pre-existing freedom to choose one's suppliers for legitimate, economic reasons and decided against compulsory bargaining. By the enactment of section 2304, this careful balancing of the interests became national policy.

The Michigan Supreme Court acknowledged that a purchaser's freedom to deal individually with a farmer is

destroyed by the Michigan Act. (Opinion, J.S. App. A5-A8). Under the Michigan Act, an accredited association is the exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers. Mich. Comp. Laws § 290.713. The handler must bargain with the association if he has had previous, substantial dealings with it or farmers included in its bargaining unit; individual negotiation with farmers is prohibited. Mich. Comp. Laws § 290.704(1)(g), (h). If a processor does not choose, for whatever reason, to bargain with the association, he is barred from purchasing any quantity of the commodity produced by the unit. Mich. Comp. Laws § 290.715. In short, handlers are forced to deal with cooperatives.

In order to avoid the obvious conflict in statutory policies, the state court treated section 2304 as meaningless surplusage. The court held that section 2304 did not represent a balancing of rights by Congress and so does not preclude "a state from choosing to readjust pre-existing freedom to deal." (Opinion, J.S. App. A14).

In so holding, the court read section 2304 out of the Federal Act and pretended as if Congress had passed an earlier version of the bill. Section 2304 was the product of years of congressional debate. It was consciously added to the bill by the Senate and consciously retained by the House. Congress did not treat section 2304 as meaningless. The members of Congress believed that they were preserving a competitive system and protecting the right of a purchaser to be free from compulsory bargaining. They were entitled to assume that the states would not undermine this system.

In summary, the challenged provisions of section 4 and 13 of the Michigan Act upset the balance established by Congress in section 2304 of the Federal Act.

III. THE MICHIGAN ACT'S FRUSTRATION OF FEDERAL RIGHTS AND POLICY REQUIRES ITS PREEMPTION.

This Court has long held that a state statute must fall if it "stands as an obstacle to the accomplishment and execution of the full objectives and purposes of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). A state statute is therefore preempted if its effect is the frustration of federal rights or policy, regardless of the state law's purpose. *Perez v. Campbell*, 402 U.S. 637, 650-52 (1971). Under these principles, the Michigan Act is void.

A state statute stands as a clear obstacle to federal law if it destroys a federal right. *See, e.g., Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981). This most patent of preemption standards invalidates those provisions of the Michigan Act that destroy a farmer's federal right not to join or deal through cooperatives. (See Section II. B. above). The destructive effect of state law on this federal right is clear and inescapable.

But the preemption doctrine is not limited to preventing the destruction of federal rights. This Court has invalidated state laws that do not destroy federal rights but merely interfere with federal policy. For example, the Court has voided a state unfair competition law that purported to prevent the copying of unpatented articles. *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964). The federal patent laws do not expressly allow copying of unpatented articles, nor do they forbid the states from doing so. The state law was void not because it destroyed a federal right, but because it interfered with federal policy and afforded "protection of a kind that clashes with the objectives of the federal patent laws." 376 U.S. at 231. *See also Perez v. Campbell*, 402 U.S. 637 (1971).

A state law similarly frustrates federal policy if it balances competing interests in a manner inconsistent with the approach taken by Congress. Even when the state and federal laws share a common goal, if the method chosen by the state to further that goal upsets the balance struck by federal law, the state law must fall. *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982); *Mite Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980), *aff'd on other grounds sub nom. Edgar v. Mite Corp.*, 457 U.S. 624 (1982); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977), *cert. denied*, 439 U.S. 803 (1978).

It is this principle that voids the provisions of the Michigan Act which compel processors to deal with associations, because those provisions frustrate the policy of the Federal Act. Congress carefully considered the manner in which farm bargaining should be regulated. It explicitly rejected the approach taken by the Michigan legislature. Congress instead envisioned a free market system and embodied that system in a statute designed to establish the "rules of the road". May, 1967, Senate Hearings, *supra* page 15, at 14. The Federal Act accordingly expresses a national policy accommodating the conflicting interests of farmers, associations and processors. Michigan cannot upset this balance by rejecting the free market system established by Congress and substituting its own set of conflicting rules.

The Michigan Act must give way to conflicting federal policy. That conclusion "is but the necessary consequence of the Supremacy Clause of our National Constitution." *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981).

RELIEF REQUESTED

Appellants pray that this Court declare the challenged provisions of sections 4, 10 and 13 of the Michigan Act to be in conflict with the Federal Act and therefore unconstitutional; that the contrary judgment of the Michigan Supreme Court be reversed; and that appellants be awarded their costs.

Respectfully submitted,

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